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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-773

VERLON HILBURN, ET AL.,

Petitioners,

versus

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners — Verlon Hilburn, C. E. Hilburn, Jerry Hilburn, Bill R. Hilburn, Darlene P. Hooper, Sam Teague, J. A. White, and H. & G. Ranch, a partnership composed of C. E. Hilburn and Sam Teague — respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on August 30, 1972.

OPINIONS BELOW

DISTRICT COURT: The District Court entered judgment for Petitioners on their Complaint against the Secretary of Agriculture and the United States Department of Agriculture, on June 22, 1971, (Appendix

B, Infra, p. 18a), having severed the issues of the Complaint for non-jury trial from the counter-claim of the Defendants, on which a jury had been demanded. The Memorandum Opinion of the District Court (Appendix A, Infra, p. 1a) was not reported.

COURT OF APPEALS: The Opinions of the Court of Appeals (Appendix A, Infra, p. 12a), reported at 463 F. 2nd 1207, included the original judgment of said Court rendered on June 2, 1972, and Petition for Rehearing denied on June 22, 1972; subsequently, the Court *sua sponte* called for additional briefing, but thereafter, on August 30, 1972, determined to adhere to its original opinion, and its order recalling and reissuing its mandate is also included in its published opinion as well as in Appendix A, infra.

JURISDICTION

The judgment of the Court below (Appendix A, Infra., p. 12a) was entered on June 2, 1972. A timely Petition for Rehearing was denied on June 22, 1972. (Appendix B, Infra., p. 28a). Subsequently, after the Court had requested and considered additional briefing to consider FUENTES v. SHEVIN, decided by the Supreme Court on June 12, 1972, the Court below recalled its original mandate, but adhered to its original opinion and reissued its mandate on August 30, 1972 (Appendix B, Infra., p. 31a).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

The Petitioners are farmers who had participated in various programs of the Department of Agriculture during the years 1964 and following. In the Spring of 1968, the Department sent an investigator, or "auditor", to inquire into whether the Petitioners had fully complied with all of the Department Regulations governing the conduct of programs providing for various payments to farmers. After several months of *ex parte* investigation on his part, this "auditor" reported to the Department of Agriculture that, in his opinion, the Petitioners had violated various regulations during the years 1964 through 1968, and that they should be required to reimburse the Department for payments previously received by them aggregating over $400,000.00.

No hearing or proceeding of any kind was held, and the Petitioners' only opportunity to be heard was that from time to time during his investigation, the "auditor" interrogated various of the Petitioners informally.

Upon receipt of the "auditor's" report, the Department of Agriculture, without notice or hearing to Petitioners, issued a "stop order" affecting any further payments to Petitioners of farm program payments, and thereby, on the principle of off-set, and from program payments for subsequent years conceded to be due to Petitioners, reimbursed itself for all amounts which the "auditor" believed were improperly paid to Petitioners in the earlier years.

Subsequently, the amount so withheld was reduced to approximately $272,000.00, and this sum is still being withheld, more than four years after the stop-order was issued.

The questions are:

(1) Did the principles of "Due Process of Law" require the Department of Agriculture to afford notice and hearing to Petitioners before withholding from them $272,000.00 of earned program payments?

(2) Was the administrative action of the Department of Agriculture, whereby it determined, (without notice or hearing to Petitioners, and with no opportunity for Petitioners to be confronted by the witnesses, or to cross-examine the witnesses, or to present evidence by counsel), that Petitioners were indebted to the Department for sums improperly paid to them in earlier years, violative of the principles of Due Process?

(3) When the Department of Agriculture determines, by an *ex parte* investigation, and without procedural or legal safeguards being afforded to the parties being investigated, that such parties owe the Department certain refunds, can the Department then, by administrative fiat, without notice or hearing, collect the amount which it claims to be due?

(4) Assuming that the Department of Agriculture would have had to sue Petitioners for the claimed overpayments if there had been no sums due against

which offsets could be made, did the availability of off-set entitle the Department to simply ignore the principles of Due Process and collect its claim by administrative fiat?

(5) Are the Regulations of the Department of Agriculture, which it claims to have followed in this case, invalid (as so applied) because violative of Constitutionally required Due Process of Law?

(6) If the Regulations of the Department of Agriculture, which it claims to have followed in this case, are not unconstitutional *per se*, was the Department's application of its Regulations in this case, under the undisputed facts shown, violative of the Petitioners' rights to Due Process of Law?

(7) Are the principles of Due Process violated when the Department of Agriculture extends the applicability of its Regulations to cover a set of facts and circumstances like those found in this case?

(8) After *ex parte* determination of the merits of its claims against Petitioners, and after "collection" of such claims through off-set and by administrative fiat, are the requirements of Due Process then met when the Department of Agriculture tenders to the Petitioners a so-called "Appeal", at the hearing of which no evidence is offered to support the earlier administrative determinations, and the Petitioners are denied the opportunity to be confronted by the witnesses against them and to cross-examine such

witnesses, or even to be informed of the evidence considered against them when the administrative determination was made?

(9) Are the principles of Due Process violated when the Department of Agriculture, by the promulgation and application of departmental regulations, deprives the farmers with whom it deals of the protections and safeguards of the Administrative Procedure Act?

(10) Do the principles of Due Process, or the Administrative Procedure Act itself, require that the basic requirements of such Act be made available for the protection of the rights of those with whom the Department of Agriculture deals?

(11) Is the Administrative Procedure Act, by its own terms, applicable to adjudications which the Department of Agriculture makes in its dealings with farmers?

(12) The Department of Agriculture has filed in this case a counter-claim which puts in issue the merits of its claims for over-payments to Petitioners, but it was not ready for trial of such counter-claim when the Petitioners' Complaint was called for trial, and without objection, Petitioners' Complaint was severed and tried. Did the Court of Appeals correctly hold that Petitioners' were not entitled to relief against the withholding of their earned payments because any deprivation of Due Process would be cured when the counter-claim is tried on its merits?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The jurisdiction of the District Court was invoked, in this action for mandamus and declaratory judgment against the Secretary of Agriculture, under the provisions of 28 U. S. C. § 1361, which reads as follows:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.",

And, 28 U. S. C. § 2201, which reads in part as follows:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

Petitioners contend that the adjudications made by the Department of Agriculture, in this case, should have been required to conform to the mandates of the

Administrative Procedure Act, 5 U. S. C. §§ 551-559. Pertinent provisions of this Act are set forth in Appendix C, Infra., p. 33a.

The Department of Agriculture contends, on the other hand, that it was entitled to deal with Petitioners in accordance with the provisions of certain "Regulations" which the Department itself had promulgated; and that these Regulations could be (and in this case, in fact, were) interpreted broadly enough to authorize the Department to adjudicate claims of improper payment to Petitioners and to off-set other payments due to Petitioners against "over payments" thus found for prior years. Pertinent provisions of various Department of Agriculture Regulations are set forth in Appendix C, Infra., p. 40a.

STATEMENT

This is a "Due Process" case. Petitioners complain that they have been deprived of their property by the United States Department of Agriculture without due process of law. Petitioners base their complaint upon certain undisputed facts which the District Court found fully sufficient to support the complaint. (D. C. Op., Appendix A, Infra., p. 1a).

The Court of Appeals did not find to the contrary, but rather simply held that such deprivation of due process as had occurred, if any, would be "cured" upon the eventual trial of a pending Counter-claim. (C. A. Op., Appendix A, Infra., p. 12a).

Petitioners contend that the undisputed facts clearly show such a flagrant and damaging deprivation of their basic rights that the possibility of some eventual restoration of their property does not afford adequate relief. Since November, 1968 a period of four years, the Department of Agriculture has held (and claimed as an off-set) more than $272,000.00 of monies conceded to have been earned by Petitioners in years with respect to which no question has been raised. (In the interest of strict accuracy, not all of this was withheld at the same time, but it should also be noted that at one time the amount withheld amounted to over $400,000.00, the Department having simply withheld every available dollar, as the Petitioners variously accrued their rights to the program payments, without having made any good faith effort to even determine the true size of its claim against the Petitioners. Not until after this suit was filed did the Department determine what it really claimed and pay to Petitioners the excess that it then held.)

It is undisputed that the Department of Agriculture, without notice or hearing, and based solely upon an *ex parte* investigation conducted by its own personnel, determined that Petitioners had been paid certain sums to which they were not entitled, during the years 1964 through 1967 (and certain minor payments already advanced in 1968 before the stop-order was issued). Even before the investigation was completed, and when the amount of the claimed overpayment had not been determined, the Department availed itself of the principles of off-set, claiming the right to this remedy on the authority of its own regulations, and ordered all further payments to Petitioners halted.

Then, almost four months later, the Department began issuing notices to Petitioners setting forth the claimed basis for the stoppage of payments. These notices were issued, by means of letters, (Appendix D, Infra., p. 59a), over a period of almost four additional months, such notices simply informing Petitioners of the conclusions previously arrived at without hearing and of the accomplished fact of collection by off-set.

These notices extended to Petitioners the right to "appeal" the determinations previously made to the same and identical authority (and individual) who had made the initial determinations. However, from the outset, the Department made it plain to Petitioners that such "appeal" would be nothing more than an opportunity for Petitioners to present, *ex parte*, any matters they might deem relevant, and that not even on such "appeal" would Petitioners be informed of the evidence against them or be entitled to confront or cross-examine the witnesses against them.

A hearing on the "appeal" was scheduled, in July 1970, and the Petitioners attended the hearing but refused to go forward with an *ex parte* attempt to dissuade the "Hearing Examiner" of his prior determinations made in his capacity of Deputy Administrator, when the Department refused to present its evidence and witnesses for cross-examination. (A full transcript of this hearing is a part of the Record below.)

Thus failing in their attempts to secure a meaningful hearing, even 20 months following the original confiscation of their money, Petitioners filed this suit for mandamus and declaratory judgment. The Govern-

ment filed a counter-claim, placing in issue the charges of violations of program regulations upon which it had originally based its determination that refunds were due from Petitioners.

A jury having been demanded on the counter-claim only, the Petitioners' complaint was severed without objection, and tried separately, with judgment for Petitioners. (Appendix B, Infra., p. 18a).

On appeal, the Government contended that its actions were entirely legal and proper, claiming, in effect, that the Department of Agriculture is not required to adhere to the basic principles of fairness represented by the Administrative Procedure Act and the constitutional guaranties of due process on which the Act is based.

In reversing the trial court, the Court of Appeals skirted the issue of due process, stating that it was "unnecessary to venture into the nuances of the Hilburns' arguments on this point for all essential due process protections will be accorded to them by the jury trial to be held on the Government's counter-claim".

The essential holding of the Court of Appeals' opinion is that a "pretermination" hearing was not required, because, "Assuming they win on the counter-claim, the only prejudice which the Hilburns will suffer under this course is the termination of their rights to later year payments during the litigation process". (Appendix A, Infra., pp. 15a and 16a).

In this connection, we respectfully point out that this "minor" prejudice has thus far consisted of the withholding from them of from $272,000.00 to more than $400,000.00 for more than four years. Even assuming that the impact of this deprivation was not otherwise economically hurtful to Petitioners, it is obvious that the value of simple interest on this sum at the legal rate (in Texas) of 6% to the present date is more than $65,000.00, and the time which may still be required to conclude the litigation process could increase this figure substantially.

Petitioners respectfully urge that the Due Process issue, which formed the original basis for federal jurisdiction in the trial court, was squarely presented to the Court of Appeals, but avoided by that Court, and that it is now directly presented to this Honorable Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in this case constitutes such a flagrant departure from the principles of due process mandated by the decisions of this Court, and so clearly conflicts with many decisions of other Courts of Appeal (as well as other decisions of the Fifth Circuit Court itself), that failure to correct the errors of such decision will result not only in a miscarriage of justice to the Petitioners, but also in allowing the Department of Agriculture to continue its practices imposed upon Petitioners here, to the great prejudice and detriment of other farmers similarly situated.

If the Department of Agriculture cannot administer its programs without depriving American citizen-farmers of rights that are as basic as the Republic itself, then our Country is in deep trouble. This Department of our Government has previously demonstrated its contempt for the rights of the citizens with whom it deals, and has had to be restrained in its excesses. BARLOW vs. COLLINS, 397 U. S. 159 (1970); STARK vs. WICKARD, 321 U. S. 288; MORGAN vs. UNITED STATES, 304 U. S. 1; GONZALEZ vs. FREEMAN, 334 F. 2d 570 (D. C. Cir. 1964); ENVIRONMENTAL DEFENSE FUND, INCORPORATED vs. HARDIN, 428 F. 2d 1093 (D. C. Cir. 1970); PEOPLES vs. UNITED STATES DEPARTMENT OF AGRICULTURE, 427 F. 2d 561 (D. C. Cir. 1970); FREEMAN vs. BROWN, 342 F. 2d 205 (5th Cir. 1965); MAXWELL vs. BENSON, 173 F. Supp. 75 (N. D. Iowa 1959); AYCOCK-LINDSEY CORPORATION vs. UNITED STATES, 171 F. 2d 518 (5th Cir. 1948); FOWLER vs. GAGE, 301 F. 2d 775 (10th Cir. 1962); MORROW vs. CLAYTON, 326 F. 2d 36 (10th Cir. 1963).

The present case is another in a long line of cases where the Department of Agriculture has had to be taught, one specific point at a time, that administrative convenience, or even necessity, cannot override the constitutional requirements of due process. SWIFT AND COMPANY vs. UNITED STATES OF AMERICA AND FREEMAN, SECRETARY OF AGRICULTURE, 308 F. 2d 849 (7th Cir. 1962).

The case perhaps most clearly illustrating the issues here presented, as applied to the practices of the Department of Agriculture in issuing regulations which

impair basic rights, is GONZALEZ vs. FREEMAN, 334 F. 2d 570 (D. C. Cir. 1964). By re-stating facts, and by substituting "recapture of program payments" for "debarment", one could virtually adopt the opinion in that case to dispose of this one.

In that case, Chief Justice Burger described the proceedings which had led to the debarment of Gonzalez as follows:

> "At no time was there any detailed specification of charges so far as the record shows, although the details may well have been discussed in conferences. No hearing was held, no evidence recorded, no findings were made. At no point were Appellants in a position to cross-examine officials who proffered or supported the allegations which presumably led to debarment."

The Court held that the Administrative Procedure Act was applicable to adjudications (such as debarment) made by the Department of Agriculture, and that the regulations promulgated by the Department, and followed in debarring Gonzalez, were so obviously lacking in meeting the required standards of due process that it was not even necessary to test them by Constitutional standards; they did not even meet the test of the Statute.

The same conclusion should have been reached in the present case, and the failure of the Court of Appeals to so hold clearly presents the Constitutional is-

sue. The following statement from GONZALEZ vs. FREEMAN makes this plain:

> "* * * We cannot agree that Congress intended to authorize such consequences without regulations establishing standards and procedures and without notice of charges, hearings, and findings pursuant thereto. Absent such procedural regulations and absent notice, hearing and findings in this case, the debarment is invalid; to reach any other conclusion would give rise to serious constitutional issues."

The undisputed facts proved at the trial show the following circumstances constituting the deprivation of Petitioners' property without due process, all of such facts being recognized in the opinion of the District Court (Appendix A, Infra., p. 1a), to-wit:

(1) Customary hearings and determinations of matters involving the several Petitioners at the County and State level were dispensed with in this case, and all original determinations were made at the "national" level in Washington, because the Petitioners severally farmed in several counties in three States. This was done for the convenience of the Government.

(2) The several Petitioners were investigated together, almost as if they constituted a single entity, although their operations and activities were generally entirely separate from each other.

(3) Although from time to time the investigator interrogated the Petitioners, and they knew that they

were being investigated, they were denied information about the exact nature of the matters being inquired into, and did not know the details of the "evidence" being gathered by the investigator.

(4) The Government concluded that it should avail itself of the principles of off-set, and thereby stopped payment of all further program payments to Petitioners, not later than November, 1968, in spite of the admitted facts that:

(a) The payments stopped were for program matters not under investigation, and as to which no question has been raised to this day; and,

(b) The investigation was still incomplete, and no determination had been made as to how large the claimed "overpayments" in prior years were; and,

(c) No hearing of any kind had been held, no notice of the charges against them had been given to Petitioners, and no findings had been made by the Department of Agriculture.

(5) In spite of the stop-payment order, the Petitioners were allowed to continue their participation in the various farm programs, and they continued to accrue the right to various program payments for the years 1968, 1969 and 1970, but the various sums accruing to them continued to be withheld under the stop-payment order. Eventually the amount so withheld amounted to more than $400,000.00, an amount which exceeded by at least $127,000.00 the Government's claim against them. The excess was not finally paid to Petitioners until 1971.

(6) The first official notice to Petitioners of the charges against them came in a series of letters to Petitioners in the months of February through June, 1969. These letters stated little more than the conclusions previously arrived at by the Department, and did not fairly apprise Petitioners of the nature of the charges against them or the nature of the "evidence" on which these charges were based,

(7) The efforts of Petitioners to secure information about the specific charges against them were entirely unsuccessful from 1968 through early 1970. Finally, in February 1970, their counsel was furnished with a portion of the audit report containing details of the investigation. Not until July, 1970, was the balance of the report furnished to Petitioners, if indeed it can be assumed that such report is actually a complete record of all the evidence that was considered by the Department. After all, when evidence is taken and considered *ex parte*, how can the accused ever really know what was considered against him?

(8) One Roy Jordre, an officer in the office of the Deputy Administrator, participated in the evaluation of the materials gathered by the investigator, and in the decision to issue the stop-payment. Then, in July, 1970, when a hearing on this matter was finally held in Washington, this same Roy Jordre was designated and sat as the Hearing Examiner on the "Appeal". This is a practice specifically prohibited by the Administrative Procedure Act 5 U. S. C. 554 (d). (See Appendix C, Infra., p. 37a)

(9) Petitioners made numerous unsuccessful efforts to secure hearings on the matters at issue at the County and State level.

(10) When the hearing at the Washington level was finally scheduled and held in July 1970, it proved to be a meaningless exercise in frustration for Petitioners. It had become increasingly clear to Petitioners that the Department was satisfied with the conclusions it had reached from its investigations. Mr. Flores, the prosecutor had presented his evidence and witnesses, without the safeguards of cross-examination, to Mr. Flores, the judge and jury; the verdict had been returned; and Mr. Jordre, a participant in the investigation, trial, and verdict, had affirmed on appeal. Now, finally, a motion for rehearing would be received, by Mr. Jordre. The difficulty was, however, that the "Appellants" did not know exactly what evidence had been received and considered against them, and there was no "record" to refer to.

(11) Petitioners had served adequate and timely notice to the Government that due process afforded them the right to confront the witnesses against them and to cross examine these witnesses at the hearing. When the Petitioners arrived at the hearing, however, they were informed that the sole purpose thereof was to receive such presentation as Petitioners might care to make, and that the evidence against them was already in. In effect, Mr. Jordre, as the Hearing Examiner, was saying to Petitioners: "All right, I'm here. Change my mind if you can!"

Petitioners respectfully urge that the foregoing facts clearly show that the determination by the Department of Agriculture that Petitioners were indebted to the Government was illegally arrived at and that such determination cannot stand. If it has not been properly determined that an indebtedness exists, then the withholding, as an off-set, of the monies conceded to be otherwise payable to Petitioners should not be allowed to stand. Off-set presupposes off-setting liabilities.

If all of the facts and circumstances of this case were the same except that no later-year program payments were available as an off-set, it is clear that the Government would have had to prove its charges against Petitioners in court in order to recover a judgment against them. In such a case, the safeguards of a trial — an impartial tribunal, the right of confrontation and cross examination, application of rules of evidence, and proper placement of the burden of proof — would have been afforded to Petitioners. As an ordinary proposition, an American citizen is as safe from the confiscation of his property by the Government as he is from its confiscation by his fellow citizens or others. In the present case, however, the Government has presumed to consider itself relieved of the necessity of proving its claims against its citizens solely because of the availability of an off-set. This is might, not right; rights are not determined by the existence of the means of self-help.

The validity, *per se*, of the various Regulations of the Department of Agriculture is not in issue here. These Regulations may be entirely adequate, when fairly followed, to enable the Department to administer its pro-

grams from day to day, determining matters of acreage allotments, compliance, eligibility, etc. Specific, and usually minor, questions can usually be determined more or less informally, and usually at the County level, with occasional "appeals" to the State or National levels.

Petitioners submit, however, that it is a perversion of the letter and spirit of these Regulations for the Department to contend, as it has contended in this case, that these Regulations can be stretched to cover a situation which would usually demand a judicial determination of a claim for repayment, solely because, among these Regulations, there is a recognition of the right of off-set when there are in existence off-setting liabilities between the Government and a program participant.

In this connection, we advert again to the opinion of Chief Justice Burger, for the Court of Appeals, in GONZALEZ vs. FREEMAN, 334 F. 2d 570 (D. C. Cir. 1964). In that case, there were Regulations providing that a person would be debarred from further trading under certain conditions, just as in the present case there is a Regulation that a program participant must refund payments improperly paid to him. The same vice exists in both cases: the Regulations are deficient in providing adequate standards, procedures, and methods for determining the existence of the condition which gives rise to the sanction.

The holding of Court of Appeals, in the present case, is in direct conflict with GONZALEZ vs. FREEMAN,

insofar as it concludes that the Regulations of the Department of Agriculture "are fully applicable to this case". (Appendix A, Infra., p. 14a) They may be "applicable", as far as they go, but they are inadequate and incomplete in that they do not provide for procedures whereby the rights of program participants can be fairly determined. The Regulations, as applied, must be tested by the standards of basic fairness required by the Administrative Procedure Act and the Due Process clause of the Constitution.

One of the most recent cases from this Court speaking to the due process issue is FUENTES vs. SHEVIN, 405 U. S. ____, 92 S. Ct. 1983 (1972). The Court of Appeals apparently recognized the probable applicability of this case, which was decided subsequent to the opinion of the Court of Appeals herein on June 2, 1972, since it reopened the case for additional briefing. (Appendix B, Infra., p. 30a) However, in spite of its inclination to reconsider, the Court of Appeals determined to disregard this recent clarification of the purport of GOLDBERG vs. KELLY, 397 U. S. 254 (1970).

GOLDBERG vs. KELLY was the only case cited in the Opinion of the Court of Appeals in the present case, and this attention to GOLDBERG was directed to distinguishing it on the same ground of erroneous understanding of its teaching that the Court laid at rest in FUENTES. GOLDBERG had been misunderstood. Some Courts had been inclined to limit its application to those situations where the deprivations were of such "basically necessary" items as wages and welfare benefits.

The Court of Appeals fell into this error in the instant case:

> "In this latter context, we must determine if the ramifications of GOLDBERG vs. KELLY, 397 U. S. 254, 90 S. Ct. 1011 (1970) require a pre-termination hearing. We think not. The result in GOLDBERG vs. KELLY was based on a judicial notice of the fact that welfare recipients as a class would be deprived of their very means of existence while awaiting the outcome of a post-termination hearing. In turn, those recipients' necessary search for daily subsistence would adversely affect their ability to seek redress from the Welfare Bureaucracy. No evidence of such dire consequences was adduced in this case. There is every reason to believe that farmers in general, and the Hilburns in particular, will be fiscally and physically able to continue farming while awaiting the completion of administrative and legal processes. We can judicially notice no comparable impairment in their ability to seek redress." HILBURN vs. BUTZ, 463 F. 2d 1207, 1209 (5th Cir. 1972)

It is of little consequence that the record in this case does have substantial evidence of severe fiscal consequences accruing to the Hilburns, whom the Court of Appeals apparently presumed to be sufficiently affluent to laugh off the deprivation of $272,000.00 or so for a few years, and that this evidence was specifically pointed out to the Court, but ignored, in the Motion for Rehearing. What is of more consequence is

that the Supreme Court has made it plain, in FUENTES vs. SHEVIN, that the nature of the deprivation is not the controlling factor in determining the extent of the mantle of protection cast by the Due Process clause.

The protection of the Due Process clause has been denied to Petitioners in this case, and it has been denied through error on the part of the Court of Appeals. This error should be corrected. This deprivation can be ended; this manifest injustice can be righted, now.

Of primary importance in the statement of Petitioners' position in this case is the matter of the right of cross-examination. This is of importance not only as a matter of due process *per se*, but because the Petitioners have consistently urged that they are not guilty of the violations charged against them in the earlier years, and that they can so prove if given the opportunity, in a full and fair hearing with judicial safeguards, such as the right of cross-examination.

It is elementary that the right to cross-examine is one of the most important foundations of the entire judicial process:

> "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. * * * All parties * * * must be given opportunity to cross-examine witnesses * * *." INTERSTATE COMMERCE COMMISSION vs. LOUISVILLE AND NORTHERN RAILROAD COMPANY, 227 U. S. 88 (1913).

> "'The fundamental requisite of due process of law is the opportunity to be heard.' GRANNIS vs. ORDEAN, 234 U. S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' ARMSTRONG vs. MANZO, 380 U. S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.
>
> "The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures." GOLDBERG vs. KELLY, 397 U. S. 254 (1970).

It has been recognized by this Court that the right of cross-examination may be of even more than ordinary consequence in certain types of proceedings. Petitioners feel that the undisputed facts of this case

present such a situation. In this case, Mr. Flores, the investigator, spent from March to November in 1968 going about in three or four states, interviewing witnesses and examining records. Then he summarized the results of this activity in an "audit report", over 500 pages long, which he presented to his supervisors in Washington; and it was on the basis of this report and the recommendations of Mr. Flores that the Department made its determinations and based its conclusions. Under the present state of the record, no one is in a position to determine how either Mr. Flores, or any of the witnesses he interviewed, may have been influenced by bias, prejudice, pre-conceived ideas, faulty memory, or other impediments to arriving at a full, fair and truthful record of facts concerning Petitioners' activities in 1964 through 1968.

The shortcomings of such a method of presenting evidence to the finder-of-facts was recognized in MORGAN vs. UNITED STATES, 304 U. S. 1 (1938), where the Court discussed the ramifications of presenting a summary of the evidence, prepared by subordinates from their investigations, to the decision maker. But, it was in GREENE vs. McELROY, 360 U. S. 474 (1959), that this Court most clearly stated its position with respect to adjudications made under circumstances such as those here presented:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case

must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative and regulatory actions were under scrutiny. * * * Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. * * *

"Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:

> 'For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for test-

> ing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.'
>
> Little need be added to this incisive summary statement except to point out that under the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally." GREENE vs. McELROY, 360 U. S. 474, 496 (1959).

Petitioners deem it unnecessary to discuss at length the holdings of the many opinions of this Court which are directly in point on the due process issue here presented. While the facts may differ, from case to case, the standards of basic fairness required are the same: there must be a hearing; the hearing must precede the taking of the property; the hearing must be afforded at a meaningful time; the right to notice and hearing must be granted at a meaningful time and in a meaningful manner; a wrong is no less a wrong

because it may later be undone; the right to a he
must include the right to cross-examine the witn
against you.

Petitioners respectfully cite the following c
which are directly supportive of their position in
case, without further discussion:

(1) FUENTES vs. SHEVIN, No. 70-5039, 405
____, 92 S.Ct., 1983 (1972).

(2) SNIADACH vs. FAMILY FINANCE CO
395 U. S. 337 (1969).

(3) BODDIE vs. CONNECTICUT, 401 U. S
(1971).

(4) GOLDBERG vs. KELLY, 397 U. S. 254 (1

(5) STANLEY vs. ILLINOIS, 405 U. S. ___
S.Ct., 1208 (1972).

(6) ARMSTRONG vs. MANZO, 380 U. S. 545 (1

(7) BARLOW vs. COLLINS, 397 U. S. 159 (197

(8) STARK vs. WICKARD, 321 U. S. 288 (194

(9) MORGAN vs. UNITED STATES, 304 U.
(1938).

(10) HANNAH vs. LARCHE, 363 U. S. 420 (19

(11) OPP COTTON MILLS, INC. vs. ADMI
TRATOR, 312 U. S. 126 (1941).

(12) JOINT ANTI-FASCIST REFUGEE C
MITTEE vs. McGRATH, 341 U. S. 123 (1951).

(13) SERVICE vs. DULLES, 354 U. S. 363 (1957).

(14) CAFETERIA AND RESTAURANT WORKERS UNION vs. McELROY, 367 U. S. 886 (1961).

(15) GRANNIS vs. ORDEAN, 234 U. S. 385 (1914).

(16) GREENE vs. McELROY, 360 U. S. 474 (1959).

(17) OHIO BELL TELEPHONE COMPANY vs. PUBLIC UTILITIES COMMISSION OF OHIO, 301 U. S. 292 (1937).

(18) WONG YANG SUNG vs. McGRATH, 339 U. S. 33 (1950).

(19) INTERSTATE COMMERCE COMMISSION vs. LOUISVILLE AND NORTHERN RAILROAD COMPANY, 227 U. S. 88 (1913).

(20) LYNCH vs. HOUSEHOLD FINANCE CORP., 405 U. S. ____, 92 S. Ct. 1113 (1972).

(21) UNITED STATES vs. ILLINOIS CENTRAL RAILROAD CO., 291 U. S. 457 (1934).

(22) LONDONER vs. CITY AND COUNTY OF DENVER, 210 U. S. 373 (1908).

Petitioners respectfully point out one additional factor in this case: This case has now been pending for more than two years; the Government has had the money for four years. Since it has the money, and is resisting every effort to litigate the matter of entitlement, it has not been interested in bringing to trial its

counter-claim. Even if the counter-claim sho
brought to trial promptly at this time, such tri
probable appellate procedures can reasonably
pected to take at least another two years or mor

If this Court refuses this Petition, justice will t
be delayed for a considerable additional period o
The Court of Appeals did not consider the withh
Petitioners' money during the litigation process
a serious deprivation, but Agriculture Departme
gram payment money is a matter of utmost
tance to farmers. BARLOW vs. COLLINS, 397
159 (1970). It is often the difference between su
and collapse in the business of farming. It is
important to the farmer than Welfare payments
digent persons. GOLDBERG vs. KELLY, 397 U.
(1970).

CONCLUSION

The decision of the Court of Appeals is clea
roneous. It is directly in conflict with the many
sions of this Court in Due Process cases. It oper
deprive Petitioners of substantial rights, and
tutes license to the Department of Agriculture
tinue its improper treatment of the American f
This petition for a writ of certiorari should be g

Respectfully submitted,

Earnest L. Langley
P. O. Box 1818
Hereford, Texas 79045

CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Petition have been served, by United States Mail, in conformity to Rule 33, Rules of the Supreme Court, upon the following counsel of record, to-wit:

(1) Mr. Frank McCown
United States Attorney
206 United States Courthouse
Fort Worth, Texas 76102
ATTN: Mr. William L. Johnson, Jr.
Assistant United States Attorney

(2) Office of the General Counsel
United States Department of Agriculture
Washington, D. C. 20530

(3) Mr. Andrew J. Steinmeyer
Department of Justice
Washington, D. C. 20530

(4) The Solicitor General
Department of Justice
Washington, D. C. 20530

Earnest L. Langley
Counsel for Petitioners

APPENDIX A

OPINION OF THE DISTRICT COURT

U. S. District Court, Northern District of Texas, Filed June 22, 1971, Joseph McElroy, Clerk, By Ruby Alexander, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

VERLON HILBURN, et al,
Plaintiffs,

versus Civil Action No. 5-821

CLIFFORD M. HARDIN, Secretary
of Agriculture, et al,
Defendants.

MEMORANDUM OPINION

Plaintiffs are the owners and operators of various farming and ranching interests in the States of Texas, New Mexico and Arizona and the Defendants are Clifford M. Hardin, Secretary of Agriculture and The United States Department of Agriculture.

Plaintiffs sue for a writ of mandamus ordering Defendants to pay Plaintiffs sums earned by them for the years 1968, 1969 and 1970 under certain agriculture programs administered by the Defendants, for an injunction and declaratory judgment.

POOR COPY

This Memorandum Opinion shall constitute the Findings of Fact and Conclusions of Law as determined by this Court from the pleadings, argument of counsel and the evidence introduced at the trial of this case held in Lubbock, Texas on June 2, 1971 without a jury being requested.

The Defendants duly filed their Answer and Counterclaim, and upon motion of the Plaintiffs the Court has granted a separate trial before a jury on the allegations of Defendants' Counter-claim. The only issues heard by the Court and now being determined are those raised by Plaintiffs' Complaint and prayer for mandamus, injunction and declaratory judgment and this opinion and the order of the Court, based upon this opinion, will not adjudicate or determine the merits of the Counter-claim.

Verlon Hilburn, Jerry Hilburn, Bill R. Hilburn, O. L. Hilburn and Darlene P. Hooper are brothers and sister and the children of plaintiff, C. E. Hilburn. These parties have, in general, operated their own and separate and divided farms and ranches although at various times they have had partnerships and other business relationships with each other. Because of the family connections and the widespread operations of the members of this family in three States, the Department of Agriculture instituted an investigation and audit of their payments for and participation in various agriculture programs for the years 1964 - 1967 inclusive. The other Plaintiffs were also involved because of their partnership-interests with some members of the Hilburn family, or a landlord-tenant relationship or

the ownership of a corporation by a member of the family.

The agricultural programs involved are:

(1) The Feed Grain Program, Sections 16 (H) and 16 (I) of the Soil Conservation and Domestic Allotment Act, 16 U. S. C. 590P (H) and (I), and sections 105 (D) and 105 (E) of the Agricultural Act of 1949, 7 U. S. C. 1443.

(2) The Agricultural Conservation Program, Soil Conservation and Domestic Allotment Act, 16 U. S. C. 590D, 590G to 5900, 590P (A), and 590Q.

(3) The Cropland Adjustment Program, Section 6 02 of the Food and Agriculture Act of 1965, 7 U. S. C. 1838.

Payments totaling several thousands of dollars, have been made to the Plaintiffs in varying amounts for their participation in the programs for the years 1964 - 1967 inclusive. Early in 1968 an investigation was ordered by Defendants to determine if the payments made to the Plaintiffs for these years and under these programs were proper and legal under the laws and regulations applicable thereto.

A Mr. Flores, an employee of the Department of Agriculture, was assigned by the Department to conduct the investigation and to audit these payments. Mr. Flores interviewed each of the Plaintiffs com-

mencing in March of 1968 and pursued his investigation by interviewing many other witnesses in all three states and in securing bank statements and other pertinent records and data from Plaintiffs and other sources. This investigation was known to Plaintiffs but they were never informed as to the details or results until July of 1970 when the final part of the audit report was furnished their attorney, although a portion of it had been furnished two or three months earlier.

Sometime in the fall of 1968, Mr. Flores and his superiors apparently became convinced that payments had been unlawfully made to the Plaintiffs for the year 1967 and prior thereto under these programs, and an order was issued that no further payments would be made to Plaintiffs for the years 1968 and subsequent years for their participation under the same programs. This was done pursuant to a regulation of the Department of Agriculture. (7 C. F. R. § 751.40, 7 C. F. R. §13)

Consequently, with one small exception, no payments were made to Plaintiffs for 1968 and the subsequent years and the amounts withheld eventually did exceed, by substantial amounts, the amounts of the claimed wrongful payments for the prior year. There was no evidence presented that indicated that Plaintiffs did not fully comply with each of the program requirements for 1968 and the following years. So in effect these stop-orders on payments to the Plaintiffs not only set-off the amounts claimed by the Secretary and Department to be due for wrongful payments in

prior years, but also withheld amounts in excess thereof about which there was no apparent question. Subsequently, and since the filing of this suit, these "excess amounts" have been substantially paid to Plaintiffs.

Plaintiffs challenge the procedure and the regulations of the Defendants in determining the illegality of and amounts of the alleged unlawful payments for 1967 and years prior thereto and the manner in which the Defendants enforced their determination and collected these amounts by the offset from subsequent years' payments — claiming, in essence, the lack of due process.

The admissions of the Defendants together with the other evidence presented at the trial show that the following occurred:

The Defendants commenced the investigation and audit through their employee, Flores, early in 1968, and, as above indicated, he conducted a very thorough study and investigation into the related facts, interviewing many witnesses and securing a great detail of recorded data. Plaintiffs naturally inquired of Mr. Flores and various representatives of the Defendants as to the reason for the audit, what facts were found to exist by the investigation, and what the results were. Although Plaintiffs were cooperative in furnishing any information requested of them, their inquiries were not acknowledged nor were any of the facts or results of the investigation made known to them at that time.

In the fall of 1968 Plaintiffs were informed of the suspension of their payments for that year and some or

all of the Plaintiffs requested hearings in connection therewith. These requests were made to Defendants' office managers in the various counties involved as well as contacting the appropriate state officials representing the Department of Agriculture in each of the three states. On each occasion, Plaintiffs were informed that a hearing on the state or local county level could not be afforded as this was a matter that was being handled on a "national basis."

Defendants contend that their regulations provide for the bypassing of their customary county and state level hearings in this case, citing 7 C. F. R. §701.45 and similar regulations.

Late in 1968 some of the Plaintiffs and their attorney went to Washington to do what they could to get their money released. They conferred with various officials of the Department of Agriculture for two or three days and in particular they visited at length and in detail with a Mr. Jordre. Their efforts were to no avail, but continued contacts and correspondence during the following year and months resulted in a hearing being scheduled on July 22, 1970 in Washington, D. C., and pursuant to the Department's regulations, 7 C. F. R. § 780.5 entitled Appeal to Deputy Administrator.*

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*§780.5 *Appeal to Deputy Administrator.*
Except as provided in §780.11 (a) and (b), any producer or participant who is dissatisfied with the determination of the State committee upon reconsideration of its determination or upon appeal from a determination of the county committee may obtain a review by the Deputy Administrator of such determination and an informal hearing in connection therewith by filing an appeal with the Deputy Administrator.

It was only a few weeks prior to the scheduled hearing that any part of Mr. Flores' voluminous audit report was furnished Plaintiffs' attorney, and it was on the day of the scheduled hearing that the balance was handed to him.

Upon arriving at the hearing, Plaintiffs for the first time learned that the Hearing or Appeals Examiner (it is not clear in which capacity he was to function) was the same Mr. Jordre who had previously discussed the case in detail with Plaintiffs. The evidence also discloses that Mr. Jordre had discussed this investigation and related matters with Mr. Flores, and had in fact participated previously in the Department's investigation and resulting determination of Plaintiffs' rights.

For this and other reasons Plaintiffs refused to go forward with the hearing although they were given an opportunity to present their evidence and argument. It was apparent that the hearing would not afford Plaintiffs any opportunity of examining or cross-examining any of the witnesses interviewed by Mr. Flores and they had been given no reasonable time to study or examine his complete audit.

The filing of the Complaint in this case then resulted.

Was due process afforded Plaintiffs in the determination of their rights pertaining to moneys already paid them for 1967 and prior years, and in offsetting these amounts from payments due for subsequent years? The answer is "No."

"The matter comes down to the question of the procedures' integrity and fundamental fairness." *Richardson v. Perales*, ____ U. S. ____, Supreme Court No. 108, May 3, 1971.

The record discloses, without question, that the Defendants made a determination against the Plaintiffs' rights, and then enforced this determination and collected the money previously paid by a deduction from current payments all without any notification to the Plaintiffs of the determination prior to the time it was enforced by the stop-payment order. Prior to the deduction, no opportunity was afforded the Plaintiffs to be heard — in fact such an opportunity was effectively denied at the local and state levels.

It does not appear to the Court that the Department of Agriculture had promulgated any regulations to cover this case — one in which Plaintiffs' rights to moneys previously paid are involved. The regulations cited by the Defendants are designed to cover only administrative matters such as determination of acreages, allotments and like matters. The regulation above cited (7 C. F. R. §701.45) might give authority for by-passing local hearings on such administrative matters, but even so, they are entirely insufficient to prescribe the necessary steps to afford due process.

As suggested by the present Chief Justice while a member of the United States Court of Appeals, District of Columbia Circuit, the Department of Agriculture cannot authorize debarment (which is not involved in this case) "without either regulations establishing standards and a procedure which are both fair and

uniform or basically fair treatment of appellants." *Gonzales v. Freeman*, 334 F.2d 570 (D.C. 1964). Such regulations and standards for procedure are totally lacking when applied to this case, and no uniform or basically fair treatment was afforded Plaintiffs.

But even if the Department's regulations as a whole were to be construed as being applicable here, the Department did not follow them in this case. Hearings were denied on a local or state level, and the Washington hearing in July of 1970 was afforded much too late to insure due process to the Plaintiffs. The rights of the Plaintiffs were adjudicated, determined and enforced against them long before an opportunity for hearing. Even when afforded, the hearing did not meet any requirement of basic fairness. The examiner was a participant in the investigation and resulting determinations, and, further, without an opportunity to at least have some prior inspection of the audit or a chance to examine witnesses, the hearing would not have been meaningful.

It is of course within the proper authority of the Department to re-claim moneys previously and unlawfully paid by offsetting these amounts against the moneys that may be due the recipients of the wrongful payments. It would be their duty to do so, but only if the Department used the proper procedures and afforded the protection of due process to those affected. Congress has very plainly and effectively provided the proper machinery in the Administrative Procedures Act, 5 U. S. C. §500 et seq.

Defendants do not claim that this Act was followed, and of course it was not in the absence of an examiner

to make a decision or recommended decision who had not been previously involved with the investigating and prosecuting functions of this case — as Mr. Jordre, the proposed hearing examiner, had so participated. Defendants claim that the Administrative Procedures Act does not apply to any of the adjudications under the programs involved here as the statutes creating and governing these programs do not require "that the adjudication be determined on the record after opportunity for agency hearing." (See 5 U. S. C. §554 (a).) Although this precise point has not been raised in any case that has been cited or found, it is apparent from many cases that the opposite of the Defendants' contentions is the law and that the Administrative Procedures Act should be used and followed by the Department of Agriculture in the administration of these programs. These cases have applied varying sections of this Act to the particular problems in those cases involving the Department of Agriculture and its programs. *Gonzales v. Freeman, supra,* citing Section 10(a) of the Act. *Garvey v. Freeman,* 397 F.2d 600 (10th Cir. 1968) stating: "This is a question of law reviewable under the Administrative Procedure Act, 5 U. S. C. §704."

Defendants would also contend that 7 U. S. C. § 1385 precludes any judicial review of their actions in this case. Questions of law, including the related questions of due process are reviewable. *Garvey v. Freeman, supra.*

Accordingly, the lack of regulations, or the failure of the Defendants to follow its own regulations and the procedures of the Administrative Procedures Act or to

otherwise afford procedures with integrity and fundamental fairness constitute a denial of due process to the Plaintiffs and a writ of mandamus will be issued by this Court directed to Defendants and ordering the Defendants to pay Plaintiffs all sums currently being withheld and due for Plaintiffs' participation in all the agriculture programs above listed for 1968 and subsequent years, and without offset for any payments made for prior years.

Further and in connection with the writ of mandamus, a declaratory judgment will be entered finding and declaring that Defendants' failure to follow the provisions of the Administrative Procedure Act, and the use of the procedures denying due process to Plaintiffs, as above set forth, constitute illegal and improper action without the force and authority of law.

It does not appear to the Court that the issuance of any injunction would be proper or necessary and accordingly such prayer for injunctive relief is denied.

The writ of mandamus and declaratory judgment will constitute a final order disposing of all matters presented by Plaintiffs' original Complaint.

The Clerk will furnish a copy hereof to each attorney.

Entered on this the 22nd day of June, 1971.

/s/ HALBERT O. WOODWARD
United States District Judge

OPINION OF THE COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2767

VERLON HILBURN, ET AL.,

Plaintiffs-Appellees,

versus

EARL L. BUTZ, Secretary of Agriculture and
THE UNITED STATES DEPARTMENT OF
AGRICULTURE,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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(June 2, 1972)

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

CLARK, Circuit Judge: The Secretary of Agriculture appeals from an order mandating him to pay certain sums to the Hilburn family. These monies were

concededly due them under various Department of Agriculture programs for the years 1968 through 1970; however, the Secretary had determined administratively, after an extensive investigation, that he had overpaid the Hilburns, under these same programs for the years 1964 through 1967, and that the monies owed to the Hilburns should be applied to offset such overpayments. Finding that the Secretary had a right to withhold current funds in sums equal to the amounts administratively determined to have been overpaid in prior years, at least until such time as the issues relating to these overpayments have been judicially determined, we reverse.

When the Hilburns filed this mandamus action[1] to require the Secretary to pay over the asserted offsets, the Secretary counterclaimed seeking a judicial declaration of the Hilburns' liability for the alleged overpayments. The district court severed the counterclaim — which still awaits the jury trial determination demanded by the Hilburns — and after a court hearing granted mandamus relief. The court held (1) that the Secretary's procedures for assessing the validity and amount of the alleged overpayments were unfair and fundamentally lacking in procedural due process; (2) that certain Department of Agriculture regulations relied upon by the Secretary were not applicable in the present case, and, even if they were, the Secretary

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[1] "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U. S. C. A. §1361 (Supp. 1972)

did not follow them; and (3) that the Administrative Procedure Act, 5 U. S. C. A. §500 et seq. (1967) (APA), governed the present administrative procedures, and that the Secretary had failed to conform to its dictates. Based on these determinations, the trial court concluded that since the alleged overpayments had been illegally determined, the Secretary had no right to set-off. Mandamus was, therefore, held to be the appropriate remedy for requiring the return of the withheld funds.

It is undisputed that the Hilburns became entitled to definite sums of money under Departmental programs for the years 1968 through 1970. Further, the right of the Secretary to withhold sums payable to a debtor as a set-off against any indebtedness owed to the Secretary is not contested as an abstract principle of law. The issues are focused upon the methods utilized by the Secretary in determining that the Hilburns were liable for alleged program overpayments in the 1964-1967 years. We look first to the Department's regulations, which we determine are fully applicable to this case. 7 C. F. R. §13.1 et seq. (1971) provide that set-offs may be effected in circumstances such as are present here, but do not specify any procedure to determine the existence of an indebtedness to the Government. 7 C. F. R. §780.1 et seq. (1971) afford administrative appeal rights. Hearings and initial determinations at the local and state level are not required. 7 C. F. R. §701.45 (1971). The district court apparently interpreted the regulations to require that a hearing be held at some level. However, a study of the regulations indicates

that the invocation of even an "informal hearing" is completely discretionary with the Secretary.

The Hilburns unleash their most vigorous attack upon the alleged invalidity of the regulations by asserting that they fail to meet minimum standards of procedural due process. In the alternative, the Hilburns argue that even if the regulations are facially valid, then those procedures adopted by the Secretary in this case to effectuate those regulations denied them procedural due process. Finally, the Hilburns contend that the provisions of the Administrative Procedures Act, 5 U. S. C. A. §500 et seq., govern the type of proceedings in question here. With respect to this latter contention, however, both parties concede that the APA is applicable only if due process requires that a hearing, with its concomitant procedural rights, be held. This is so because no hearing is otherwise required by statute. 5 U. S. C. A. §554 (1967).

It is unnecessary to venture into the nuances of the Hilburns' arguments on this point for all essential due process protections will be accorded to them by the jury trial to be held on the Government's counterclaim. 1 Davis, Administrative Law Treatise § 7.10 (1958). The district court has made it plain that it will conduct a trial on the merits of the counterclaim with full judicial procedural protections, at which time the Hilburns will be able to present every contention relevant to their claim that they were not overpaid.[2] As-

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[2]We intimate no opinion as to the propriety of such a full scale trial in an otherwise similar case where the Secretary has accorded the "informal hearing" provided for by 7 C. F. R. 780.8 (1971).

suming they win on the counterclaim, the only prejudice which the Hilburns will suffer under this course is the termination of their rights to later year payments during the litigation process.

In this latter context, we must determine if the ramifications of *Goldberg v. Kelly*, 397 U. S. 254, 90 S. Ct. 1011 (1970) require a pretermination hearing. We think not. The result in *Goldberg v. Kelly* was based on a judicial notice of the fact that welfare recipients as a class would be deprived of their very means of existence while awaiting the outcome of a post-termination hearing. In turn, those recipients' necessary search for daily subsistence would adversely affect their ability to seek redress from the welfare bureaucracy. No evidence of any such dire consequences was adduced in this case. There is every reason to believe that farmers in general, and the Hilburns in particular, will be fiscally and physically able to continue farming while awaiting the completion of administrative and legal processes. We can judicially notice no comparable impairment in their ability to seek redress.

We conclude that the district court erred in granting mandamus relief. The validity of the Secretary's judgment that the Hilburns have been overpaid is still to be adjudicated, and, of course, we intimate no opinion as to that question.[3,4]

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[3]Both parties concede that the Hilburns could have brought a Tucker Act claim. See 28 U. S. C. A. §1346 (a)(2) (Supp. 1972).

[4]We likewise intimate no opinion as to the availability of judicial relief when the Secretary fails to file a counterclaim to a plaintiff's claim that the Secretary's procedures for ascertaining the existence of a debt owed are constitutionally deficient."

The judgment of the district court is

REVERSED.

ON PETITION FOR REHEARING

PER CURIAM: It is ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Supplemental Order

BY THE COURT: Subsequent to our opinion of June 2, 1972 and too late to be included in briefing on rehearing, the Supreme Court, on June 12, 1972, handed down its decision in *Fuentes v. Shevin*, ____ U .S. ____, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). After the court *sua sponte* called for and considered additional briefing on the impact of that decision upon our prior opinion, the court has determined to adhere to its opinion of June 2, 1972. Pursuant to the provisions of Local Rule 15, the mandate of this court in this cause is recalled and the date of this court's final judgment on rehearing is amended to the date of this order. The mandate shall reissue immediately.

APPENDIX B

JUDGMENT OF THE DISTRICT COURT

Filed, June 22, 1971, U. S. District Court, Northern District of Texas; Joseph McElroy, Jr., Clerk, by Ruby Alexander, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

VERLON HILBURN, ET AL.,
Plaintiffs,

versus Civil Action No. 5-821

CLIFFORD M. HARDIN,
Secretary of Agriculture, ET AL.,
Defendants.

JUDGMENT

On June 2, 1971, pursuant to prior setting and notification to all parties, came on to be heard the above entitled and numbered cause, wherein Verlon Hilburn, C. E. Hilburn, Bill R. Hilburn, O. L. Hilburn, Darlene P. Hooper, J. A. White, and Wayside Gin, Inc., a corporation, are Plaintiffs, and Clifford M. Hardin, Secretary of Agriculture of the United States, and the United States Department of Agriculture, are Defendants;

And came the Plaintiffs Verlon Hilburn, C. E. Hilburn, Sam Teague, Jerry Hilburn and Bill R. Hilburn,

in person and by their said attorneys, and came the Defendants by their attorneys; and all parties announced ready for trial on the merits of the cause of action alleged in the Plaintiffs' Complaint;

And the Court being of the opinion, and so finding, that it has jurisdiction of this suit, both of the cause of action alleged by the Plaintiffs in their Complaint and of the cause of action alleged by the Defendants in their Counter-Claim, and that it has jurisdiction over all parties and that venue in this Court is proper; and that all parties are therefore properly before the Court;

And it appearing to the Court that the Plaintiffs had moved for severance of their cause of action from the cause of action alleged by the Defendants in their Counter-Claim filed herein, and no objection to such motion having been offered or urged, and it appearing to the Court that the interests of justice would be served by such severance; and no jury having been demanded on the issues presented by the Plaintiffs' Complaint, it was ORDERED by the Court that trial be held on the Plaintiffs' Complaint, and that the Defendants Counter-Claim be severed therefrom for trial at such subsequent time as the Court might order, without prejudice;

And such trial proceeding, and the Court having heard and considered the evidence and the argument of counsel, and having found the facts and the law in favor of the Plaintiffs on the cause of action alleged in their Complaint, as hereinafter set forth, and being of

the opinion that judgment should be entered as follows:

It is ORDERED, ADJUDGED and DECREED by the Court:

(1) In that the matters affecting the Plaintiff, Wayside Gin, Inc., have become moot subsequent to the filing of the Complaint, said Wayside Gin, Inc. is dismissed as a Plaintiff.

(2) In that the matters affecting the Plaintiff, O. L. Hilburn, have become moot subsequent to the filing of the Complaint, said O. L. Hilburn is dismissed as a Plaintiff.

(3) The Court being of the opinion that the Plaintiffs are not entitled to an injunction against the Defendants, the Plaintiffs' Cause of action for an injunction is denied.

(4) The Court finds that the Defendants now withhold from the several Plaintiffs, from various agricultural program payments earned by said Plaintiffs in the year 1968 and subsequent years, and with respect to which sums withheld the Defendants make no claim of illegality or improper payment, and which sums withheld the Court finds to have been withheld for the purpose of off-setting claims of the Defendants against the Plaintiffs arising in earlier years, the following sums:

From Whom Withheld	*Amount Withheld*
Verlon Hilburn	$121,018.78
C. E. Hilburn	$ 25,181.90
H. & G. Ranch (Sam Teague and C. E. Hilburn	$ 33,333.19
Jerry Hilburn	$ 34,587.48
Bill R. Hilburn	$ 30,378.61
Darlene P. Hooper	$ 1,501.30
C. E. Hilburn, for J. A. White	$ 400.00
TOTAL	$246,401.26

(5) The Court finds that the Plaintiff Verlon Hilburn had done and performed those acts and conditions required of him under his Cropland Adjustment Program contract with the Defendants for the year 1968, and had earned the payment due to him for 1968 pursuant to said contract, in the sum of $26,450.70; and that the Defendants withhold said sum from him.

(6) The Court finds that the Plaintiff Verlon Hilburn abandoned further attempts to perform the Cropland Adjustment Program contract after receiving notification from the Defendants in April 1969 that said contract had been terminated, and that it is not feasible to re-instate said contract at this time, so that the matter of reinstatement is moot and said contract will not be ordered re-instated.

(7) The court finds that the Defendants' actions, and the procedures followed by said Defendants, in determining against the several Plaintiffs the matters respecting the said Plaintiffs' participation in the

various agricultural programs for 1967 and prior years, without proper hearings, and the consequent withholding of program payments earned in 1968 and subsequent years to offset the claimed over-payments for 1967 and earlier years, and in determining against the Plaintiff Verlon Hilburn the matter of terminating his Cropland Adjustment Program contract, were actions and procedures which were illegal and improper and without the force and authority of law, thereby denying to the Plaintiffs due process of law; and the Court further specifically finds that such actions and procedures were not authorized by any valid regulations of the Department of Agriculture, and were contrary to the express requirements of the Administrative Procedure Act.

(8) Because of the Defendants' failure to follow the provisions and requirements of the Administrative Procedure Act, and because of their use of procedures denying due process of law to the Plaintiffs, as heretofore found by the Court, the Court finds that the withholding from the Plaintiffs of the various sums of money heretofore set out is illegal and improper. The Defendants are hereby ordered to pay to the several Plaintiffs all sums currently being withheld and due for Plaintiffs' participation in the various agricultural programs for 1968 and subsequent years, including the payment to Verlon Hilburn for the 1968 participation in the Cropland Adjustment Program, in the total sum of $272,851.96, same to be paid to the several Plaintiffs in the sums due to each respectively.

(9) A Writ of Mandamus will issue, directed to the Defendants and ordering such payments, in words and figures, as follows:

"TO: CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE OF THE UNITED STATES, AND THE UNITED STATES DEPARTMENT OF AGRICULTURE:

The Honorable United States District Court for the Northern District of Texas, at Lubbock, having found that you illegally and improperly withhold from the persons hereafter named the sums of money variously set forth following their names, and that such sums are due and payable to them for their participation in various agricultural programs for the year 1968 and subsequent years, without offset for any payments made for prior years, such findings and conclusions being more fully set forth in the Court's judgment and memorandum opinion attached hereto and made a part hereof;

You are hereby ORDERED AND COMMANDED that immediately upon receipt of this Writ of Mandamus, and without delay, you cease and desist from further withholding such sums of money, and that you pay to the following persons the respective sums of money set forth after their names, to-wit:

Verlon Hilburn	$121,018.78
C. E. Hilburn	25,181.90
H. & G. Ranch, by paying Sam Teague and C. E. Hilburn	33,333.19
Jerry Hilburn	34,587.48
Bill R. Hilburn	30,378.61
Darlene P. Hooper	1,501.30
C. E. Hilburn, for J. A. White	400.00
Verlon Hilburn (Cropland Adjustment Program Payment)	26,450.70

Herein fail not, but make due return hereof showing how you have executed this Writ.

By Order of the Honorable Halbert O. Woodward, United States District Judge, Northern District of Texas.

Witness the hand and seal of said Court, at offices in Lubbock, Texas, this 22nd day of June, 1971.

JOSEPH McELROY, JR.
Clerk, United States District Court for the Northern District of Texas
BY L. W. Sullivan, Deputy

(10) This judgment and the foregoing Writ of Mandamus, when issued, will constitute a final order

disposing of all matters presented by Plaintiffs' Original Complaint.

(11) This judgment will constitute a money judgment against the United States of America, as of the date of entry thereof, and will bear interest until paid as provided by law for judgments against the United States.

(12) This Court has this date entered and filed its Findings of Fact and Conclusions of Law which are here referred to and incorporated herein for all purposes, and this judgment is entered in accordance with such Findings of Fact and Conclusions of Law as well as those that are recited herein.

The Clerk will furnish a copy hereof to each attorney.

Entered on this 22nd day of June, 1971.

/s/ HALBERT O. WOODWARD
United States District Judge

DISTRICT COURT'S WRIT OF MANDAMUS

Filed, July 7, 1971, U. S. District Court, Northern District of Texas; Joseph McElroy, Jr., Clerk, By L. W. Sullivan, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

VERLON HILBURN, et al,
Plaintiffs,

versus Civil Action No. 5-821

CLIFFORD M. HARDIN, Secretary of Agriculture, et al,
Defendants.

WRIT OF MANDAMUS

TO: CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE OF THE UNITED STATES, AND THE UNITED STATES DEPARTMENT OF AGRICULTURE:

The Honorable United States District Court for the Northern District of Texas, at Lubbock, having found that you illegally and improperly withhold from the persons hereafter named the sums of money variously set forth following their names, and that such sums are due and payable to them for their participation in various agricultural programs for the year 1968 and subsequent years, without offset for any payments made for

prior years, such findings and conclusions being more fully set forth in the Court's judgment and memorandum opinion attached hereto and made a part hereof;

You are hereby ORDERED AND COMMANDED that immediately upon receipt of this Writ of Mandamus, and without delay, you cease and desist from further withholding such sums of money, and that you pay to the following persons the respective sums of money set forth after their names, to-wit:

Verlon Hilburn	$121,018.78
C. E. Hilburn	25,181.90
H. & G. Ranch, by paying Sam Teague and C. E. Hilburn	33,333.19
Jerry Hilburn	34,587.48
Bill R. Hilburn	30,378.61
Darlene P. Hooper	1,501.30
C. E. Hilburn, for J. A. White	400.00
Verlon Hilburn (Cropland Adjustment Program Payment)	26,450.70

Herein fail not, but make due return hereof showing how you have executed this Writ.

By Order of the Honorable Halbert O. Woodward, United States District Judge, Northern District of Texas.

Witness the hand and seal of said Court, at offices in Lubbock, Texas, this 22nd day of June, 1971.

Joseph McElroy, Jr.
Clerk, United States District
Court for the Northern District of
Texas
BY L. W. Sullivan, Deputy

CERTIFICATE OF SERVICE

The foregoing Writ of Mandamus was served upon the Defendant, Clifford M. Hardin, Secretary of Agriculture of the United States, and the Defendant, the United States Department of Agriculture, by delivering true copies thereof to said named Defendants, this ____ day of July, 1971.

RETURN

TO: The Honorable United States District Court for the Northern District of Texas at Lubbock:

The above and foregoing Writ of Mandamus having been served upon the undersigned, return is hereby made showing that the following action has been taken pursuant to the terms of said Writ of Mandamus, to-wit:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans La. 70130
(504) 527-6514

June 22, 1972

TO ALL PARTIES LISTED BELOW:

re: No. 71-2767 - Verlon Hilburn, et al, vs. Earl L. Butz, Secretary of Agriculture and the United States Department of Agriculture

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
By /s/ Alvis Winchester
Deputy Clerk

/amw
cc: Mr. Ernest L. Langley
Mr. William L. Johnson, Jr.
Mr. Walter H. Fleischer

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

July 17, 1972

TO ALL COUNSEL OF RECORD

No. 71-2767 - Verlon Hilburn, et al v. Earl L. Butz, Secretary of Agriculture and The United States Department of Agriculture

Gentlemen:

The parties are directed to file simultaneous memoranda within 10 days from the date of this letter, commenting upon the proper application to this Court's opinion in this case of the procedural due process rules announced by the Supreme Court's decision in Fuentes v. Shevin, No. 70-5039 decided June 12, 1972.

Very truly yours,
EDWARD W. WADSWORTH,
CLERK

By /s/ Richard E. Windhorst, Jr.
Chief, Operations Section

cc: Mr. William L. Johnson, Jr.
Mr. Walter H. Fleischer
Mr. Anthony J. Steinmeyer
Mr. Ernest L. Langley

FILED - U. S. COURT OF APPEALS - AUG. 30, 1972
EDWARD W. WADSWORTH, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2767

VERLON HILBURN, ET AL.,
Plaintiffs-Appellees,
versus

EARL L. BUTZ, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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(August 30, 1972)

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

BY THE COURT: Subsequent to our opinion of June 2, 1972 and too late to be included in briefing or rehearing, the Supreme Court, on June 12, 1972, handed down its decision in Fuentes v. Shevin, ____ U.S. ____, 92 S.Ct. 1983, ____ L. Ed. 2d ____ (1972). After the court *sua sponte* called for and considered additional briefing on the impact of that decision upon our prior opinion, the court has determined to adhere to its opinion of June 2, 1972. Pursuant to the provisions of Local Rule 15, the mandate of this court in this cause is recalled and the date of this court's final judgment on rehearing is amended to the date of this order. The mandate shall reissue immediately.

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Constitution of the United States, Amendment Five:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Mandamus Act of 1962:

> 28 U. S. C. §1361. Action to compel an officer of the United States to perform his duty
>
> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub. L. 87-748, §1(a), Oct. 5, 1962, 76 Stat. 744.

The Declaratory Judgment Act:

28 U. S. C. §2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, §111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508 §12(p), 72 Stat. 349.

28 U. S. C. §2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Pertinent Provisions of Administrative Procedure Act:

"SUPCHAPTER II — ADMINISTRATIVE PROCEDURE

"5 U.S.C. 551. Definitions

For the purpose of this subchapter —

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include —

(A) the Congress;
(B) the courts of the United States;
(C) the governments of the territories or possessions of the United States;
(D) the government of the District of Columbia;

* * * *

(6) 'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) 'adjudication' means agency process for the formulation of an order;

* * * *

(10) 'sanction' includes the whole or a part of an agency —

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

"(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action; .

• • • •

(12) 'agency proceeding' means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

"5 U. S. C. 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

"(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

* * * *

(d) The employee who presides at the reception of evidence to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title except as witness or counsel in public proceedings. This sub-section does not apply —

"(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

* * * *

5 U. S. C. 566. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence —

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specifically provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualifications of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

* * * *

"(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole

record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

* * * *

5 U. S. C. 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

• • • •

REGULATIONS — DEPARTMENT OF AGRICULTURE

Title 7 — Agriculture

Chapter VII — Agriculture Stabilization and Conservation Service (Agricultural Adjustment), Department of Agriculture

Subchapter C — Special Programs

Part 780 — Appeal Regulations (29 F. R. 8200)

§780.1 Basis, purpose and applicability.

The regulations contained in this part are issued pursuant to the Soil Conservation and Domestic Allotment Act, as amended; the Soil Bank Act, as amended; the Agricultural Adjustment Act of 1938, as amended; the Agricultural Act of 1961; the Food and Agriculture Act of 1962; the Agricultural Act of 1949, as amended; the Commodity Credit Corporation Charter Act, as amended; the Sugar Act of 1948, as amended; the Act of September 21, 1959; the National Wool Act of 1954, as amended, and

other relevant statutes; and prescribe the rules and proceedings whereby a producer or participant may obtain reconsideration and review of determinations made by the county committee or office, State committee, or Deputy Administrator under the following programs:

(a) Agricultural Conservation Program (Part 701 of this chapter).

* * * *

(e) Feed Grain Program (Part 775 of this chapter).

* * * *

(m) 1964 and 1965 Cotton Domestic Allotment Program (Part 1427 of this title).

(n) 1966 Upland Cotton Program (Part 722 of this chapter).

(o) Regional Agricultural Conservation Programs (Part 755 of this chapter). The regulations in this part shall be applicable to any request for reconsideration or appeal which is filed after the effective date of this part and shall supersede any regulations relating to requests for reconsideration or appeals contained in individual program regulations.

§780.2 Definitions.

(a) "County committee" and "Deputy Administrator" shall have the meaning given to them under the regulations governing Reconstitution of Farms, Farm Allotments and Farm History and Soil Bank Base Acreages, Part 719 of this chapter, as amended.

(b) "Producer or participant" shall mean any person whose right to participate or receive payments, or the amount thereof, under any of the programs covered by these regulations, is affected by a determination of the county committee, State committee, or Deputy Administrator. In matters involving wage claims under the Sugar Program, "producer or participant" includes any person employed on the farm in production, cultivation and harvesting work who has a claim for unpaid wages. "Producer or participant" also includes a vendor of conservation materials and services under the Agricultural Conservation Program, the Land Use Adjustment Program, or the Soil Bank Program.

(c) "Reviewing authority" shall mean the county committee, State committee, or Deputy Administrator, as appropriate.

(d) "State committee" shall have the meaning given to it under the regulations governing Reconstitution of Farms, Farm Allotments and

Farm History and Soil Bank Base Acreages, Part 719 of this chapter, as amended. In Puerto Rico and the Virgin Islands, the Director of the Caribbean Area ASC Committee shall, insofar as applicable, perform the functions of the State committee. In Hawaii, the Director of the Agricultural Stabilization and Conservation Service State Office shall, insofar as applicable, perform the functions of the State and county committees with respect to Sugar Programs.

§780.3 Request for reconsideration.

Any producer or participant who is dissatisfied with any determination initially made by the county committee or office, State committee, or Deputy Administrator, may obtain a reconsideration of such determination and an informal hearing in connection therewith by filing a request for reconsideration with the county committee. If the initial determination was made by the State committee or the Deputy Administrator, the county committee shall forward the request for reconsideration to the authority initially making the determination.

§780.4 Appeal to the State committee.

Any producer or participant who is dissatisfied with the determination of the county committee upon its reconsideration of the initial determination made by it or the county office may obtain a review of such determina-

tion by the State committee and an informal hearing in connection therewith by filing an appeal with the State committee.

§780.5 Appeal to Deputy Administrator.

Except as provided in §780.11 (a) and (b), any producer or participant who is dissatisfied with the determination of the State committee upon reconsideration of its determination or upon appeal from a determination of the county committee may obtain a review by the Deputy Administrator of such determination and an informal hearing in connection therewith by filing an appeal with the Deputy Administrator.

§780.6 Time Limitations for filing requests for reconsideration or appeals.

(a) A request for reconsideration or appeal from any determination shall be filed within 15 days after the written notice of the determination is mailed to or otherwise made available to the producer or participant. A request for reconsideration or appeal shall be considered "filed" when personally delivered or, if mail is used, when post-marked.

(b) Whenever the final date for filing a request for reconsideration or appeal prescribed in paragraph (a) of this section falls on a Saturday, Sunday, legal holiday, or other day

on which such office is not open for the transaction of business during normal working hours, the time for filing shall be extended to the close of business on the next working day.

(c) A request for reconsideration or appeal may be accepted and acted upon even though it is not filed within the time prescribed in paragraph (a) or (b) of this section if, in the judgment of the reviewing authority to whom it is made, the circumstances warrant such action.

(d) A request or appeal filed with a reviewing authority other than the appropriate one provided for in this part shall not be denied because of misdirection of the request or because of misdirection delays receipt of the request by the appropriate reviewing authority.

§780.7 Form of request for reconsideration or appeal.

Each request for reconsideration or appeal shall be in writing and signed by the producer or participant or by his authorized representative. Each request for reconsideration or appeal shall be supported by a written statement of facts, which may be submitted with or as a part of the request for reconsideration or appeal, or at any time prior to the hearing. The producer or participant may request an informal hearing or may request a determination

to be made by the reviewing authority without a hearing on the basis of the written statement submitted by him and other information available to the reviewing authority.

§780.8 Nature of informal hearing.

(a) The hearing shall be held at the time and place designated by the reviewing authority.

(b) The hearing shall be conducted by the reviewing authority in the manner deemed most likely to obtain the facts relevant to the matter in issue. The producer or participant shall be advised of the issues involved. The reviewing authority may confine the presentation of facts and evidence to pertinent matters and may exclude irrelevant, immaterial, or unduly repetitious evidence, information, or questions.

(c) The producer or participant or his representative shall be given a full opportunity to present facts and information relevant to the matter in issue and may present oral or documentary evidence. At its discretion, the reviewing authority may request or permit persons other than those appearing on behalf of the producer or participant to give information or evidence at such hearing and, in such event, may permit the producer or participant to question such persons.

(d) The reviewing authority shall have prepared a written record containing a clear, concise statement of the facts as asserted by the producer or participant and material facts found by the reviewing authority. The names of interested persons appearing at the hearing shall be included. Any documents presented in evidence should be identified. A verbatim transcript may be taken if (1) the producer or participant requests such transcript prior to the time the hearing begins and provides for its preparation and for the payment of the expense thereof, or (2) the reviewing auhority feels that the nature of the case is such as to make such transcript desirable.

(e) If, at the time scheduled for the hearing, the producer or participant is absent and no appearance is made on his behalf, the reviewing authority shall, after a lapse of such period of time as he may consider proper and reasonable, close the hearing, or may, in its discretion, accept information and evidence submitted by other persons present at the hearing.

§780.9 Determination.

The reviewing authority prior to making a determination may request the producer or participant to produce additional evidence which it may deem relevant or may develop additional evidence from other sources. Upon

reconsideration or review and within program authorities, the reviewing authority may affirm, modify, or reverse any determination made by it initially or made by a lower reviewing authority, or may remand the matter to a lower reviewing authority for such further consideration as is deemed appropriate. The producer or participant shall be notified in writing of the determination. Each other person affected by the determination shall be notified in writing of the determination. Determinations made by the Deputy Administrator shall not be appealable by the producer or participant.

§780.10 Reopening of hearing.

The reviewing authority may, upon its own motion or upon request of the producer or participant, reopen any hearing for any reason it deems appropriate unless the matter has been appealed to or considered by a higher reviewing authority.

* * *

§780.12 Delegation of authority.

Nothing contained in these regulations in this part shall preclude the Administrator, ASCS (Executive Vice-President, CCC), or his designee, on his own motion, from determining any question arising under the pro-

grams to which the regulations in this part apply or from reversing or modifying any determinations made by a State or county committee or the Deputy Administrator.

Part 775 — Feed Grains

Subpart — 1964 and 1965 Feed Grain Program Regulations (29 F.R. 590)

§775.301 General

(a) The regulations in this subpart provide terms and conditions for the feed grain program for the 1964 crop and 1961 crop, respectively (herein called "the program"), under which diversion and price support payments are made to producers who divert acreage from the production of such crop of barley, corn, grain sorghums and feed wheat (herein called "feed grains") . . . . .

* * *

§775.314 Appeals.

(a) A producer may request reconsideration of any determination made by a county committee concerning a question of fact including the feed grain base, conserving base, yield and diversion payment rates, and he may appeal such determination in accordance with the provisions of this paragraph. The producer shall

first request reconsideration by the county committee. If the producer is dissatisfied with a determination of the county committee with respect to his request for reconsideration, he may then appeal the determination to the State committee. The producer may also request reconsideration of any determination of the State committee. If he is dissatisfied with a determination of the State committee with respect to his appeal from the determination of the county committee or with respect to his request for reconsideration by the State committee, he may appeal such determination to the Deputy Administrator, in which case the determination of the Deputy Administrator shall be final. Each request for reconsideration or appeal shall be in writing and shall be supported by a written statement of facts upon which it is based. Any request for reconsideration or appeal shall not operate to extend the applicable closing date for filing Form 477. Each request for reconsideration or appeal shall be filed within 15 days after notice of the determination is mailed to or is otherwise made available to the producer: *Provided,* That a request for reconsideration or appeal may be accepted and acted upon even though it is not filed within such time limit if in the judgment of the committee or person to whom such request for reconsideration or appeal is made, the circumstances warrant such action. Nothing herein shall preclude the county committee or the State committee, on its own

motion or upon request at any time, from revising or requiring revision of any determination for any farm to correct mechanical or clerical errors resulting solely from action by a county or State committee representative.

(b) To the extent that a producer proves the actual acreages and yields for the farm for each of the years used in establishing the base acreage and normal yield either prior to receipt of Form 471 or pursuant to paragraph (a) of this section, the acreages and yields so proven shall, except for adjustments in base acreage made under §775.311 (b), be used in establishing the base acreages and yields: *Provided,* That the producer whose production records are used to prove yields on the farm shall be required to furnish production data for all other farms in the county or adjoining counties in which he had an interest in any of the years for which the yields are proven (unless there is conclusive evidence that the records presented are in fact for the specific farm), and such data shall be used in making determinations for such other farms in which the producer has an interest in the current year.

* * *

§775.317 Determination of Compliance.

(a) Determination of the acreage devoted to feed grains and of the acreage designated as

diverted acreage shall be made by a representative of the county committee or State committee in accordance with the regulations governing Determination of Acreage and Performance, Part 718 of this chapter, as amended.

(b) A representative of the county committee or of the State committee or any authorized representative of the Secretary shall have the right at any reasonable time to enter a farm, concerning which representations have been made on any forms filed under the program, in order to measure the acreage planted to feed grains and the acreage which the operator designated as being devoted to approved conservation uses on the farm, to examine any records pertaining thereto, and otherwise to determine the accuracy of a producer's representation and the performance of his obligations under the program.

* * *

§775.322 Scheme or device and fraudulent representation

(a) A producer who is determined by the State committee, or by the county committee with the approval of the State committee, to have adopted any scheme or device which tends to defeat the purpose of the program shall refund any payment received by him.

(b) The making of a fraudulent representation by a person in the payment documents or otherwise for the purpose of obtaining a payment from the county committee shall render the person liable, aside from any additional liability under criminal and civil frauds statutes, for a refund of the payments received by him with respect to which the fraudulent representation was made.

* * *

§775.326 Delegation of authority.

No delegation herein to a State or county committee shall preclude the Administrator, ASCS, or his designee, from determining any question arising under the program or from reversing or modifying any determination made by a State or county committee.

* * *

Part 775 — Feed Grains

Subpart — 1966-69 Feed Grain Program Regulations (31 F. R. 8339)

§775.401 General.

(a) The regulations in this subpart provide terms and conditions for the feed grain program for the 1966 through 1969 crops of feed

grains respectively, under which diversion and price support payments are made to producers who divert acreage from the production of any such crop of barley, corn, grain sorghums and feed wheat (herein called "feed grains")

. . . .

• • •

§775.412 Appeals.

(a) A producer may obtain reconsideration and review of determinations made under this subpart in accordance with the appeal regulations, Part 780 of this chapter, as amended.

(b) To the extent that a producer proves the actual yields for the farm for each of the three consecutive years including and ending with the second year prior to the current year, either prior to receipt of Form 477-1 or pursuant to paragraph (a) of this section, the yields so proven shall be used in establishing yields: PROVIDED, That the producer whose production records are used to prove yields on the farm shall be required to furnish production data for all other farms in the county or adjoining counties in which he had an interest in any of the years for which the yields are proven (unless there is conclusive evidence that the records presented are in fact for the specific farm), and such data shall be used in making determinations for such other farms

in which the producer has an interest in the current year.

* * *

§775.416 Determinations of compliance.

(a) Determination of the acreage devoted to feed grains and of the acreage designated as diverted acreage shall be made in accordance with Part 718 of this chapter, as amended.

(b) A representative of the county committee or the State committee or any authorized representative of the Secretary shall have the right at any reasonable time to enter a farm, concerning which representations have been made on any forms filed under the program, in order to measure the acreage planted to feed grains and the acreage which the operator designated as being devoted to approved conservation uses on the farm, to examine any records pertaining thereto, and otherwise to determine the accuracy of a producer's representation and the performance of his obligations under the program.

§775.417 Final Diversion payment and price support payment.

(a) Payments of any amounts due the producers on a farm shall be made after the farm

operator certifies that the farm is in compliance with the requirements of the program by signing Form 477, and the county committee determines that the producers and the farm are in compliance with such requirements. The signing of Form 477 by any producer after May 1 of the year following the current year shall not be approved by the county committee unless prior approval of the State committee is obtained.

(b) Except as otherwise provided herein and in Part 791 of this chaper, as amended, no diversion payment shall be made for a farm or to a producer when there is failure to comply fully with the regulations in this subpart.

* * *

(i) In the event it is determined that a producer is not entitled to any payment received, he shall refund such payment with interest at the rate of 6 percent per annum from the issue date of the payment to the date it is refunded.

* * *

§775.421 Scheme or device and fraudulent representation.

(a) A producer who is determined by the State committee, or by the county committee with the approval of the State committee, to

have adopted any scheme or device which tends to defeat the purpose of the program shall refund any payment received by him.

(b) The making of a fraudulent representation by a person in the payment documents or otherwise for the purpose of obtaining a payment from the county committee shall render the person liable, aside from any additional liability under criminal and civil frauds, statutes, for a refund of the payments received by him with respect to which the fraudulent representation was made.

§775.421, as amended, April 23, 1968 (33 F. R. 6155)

§775.421 Scheme or device and fraudulent representation.

(a) A producer who is determined by the State committee, or the county committee with the approval of the State committee, to have adopted any scheme or device which tends to defeat the purpose of the program shall not be entitled to receive diversion or price support payments and shall refund to the Commodity Credit Corporation any payments received by him.

(b) The making of a fraudulent representation by a person in the program documents or otherwise for the purpose of obtaining diversion or price support payments shall render

the person liable for a refund to the Commodity Credit Corporation of the payments received by him with respect to which the fraudulent representation was made.

(c) The provisions of this section shall be applicable in addition to any liability under criminal and civil fraud statutes.

§775.422 Setoffs and assignments.

(a) *Producer indebtedness.* Setoffs against diversion and price support payments which a producer is eligible to receive shall be made as provided in the regulations issued by the Secretary governing setoffs and withholdings, Part 13 of this title (29 F. R. 9425), and any amendments thereto.

(b) *Assignments.* Diversion and price support payments may be assigned only to the Farmers Home Administration in accordance with instructions issued by the Deputy Administrator.

* * *

NOTE: The Department of Agriculture has contended that its right of offset is based on its regulations set forth in 7 C. F. R. 13.1 — 13.10. Petitioners do not have available for reproduction in this appendix a copy of these regulations.

APPENDIX D

ADMINISTRATIVE ACTION WHICH PRECIPITATED THIS LITIGATION

The Record in this case shows, by admissions of the Defendants-Respondents, and by undisputed evidence, that in November, 1968, the Department of Agriculture stopped payment to the several Petitioners of all types of program payments earned by them under various programs of the Department of Agriculture, which stopped payments were conceded to have been earned, and as to which no claim of refund has been made except under the principles of off-set.

Thereafter, from February, 1969, through June, 1969, by a series of letters to Petitioners, the Department of Agriculture notified Petitioners of the reason for such stop-payments.

The following is a representative sample of the type of notification received by Petitioners:

(NOTE: Although this letter was dated February 28, 1968, it was actually mailed February 28, 1969, as the Record in this case reflects.)

A S C S

UNITED STATES DEPARTMENT
OF AGRICULTURE
Agricultural Stabilization and Conservation Service
Washington, D. C. 20250

AIRMAIL Feb. 28, 1968

Mr. Jerry Hilburn
Box 156
Columbus, New Mexico 88029

Dear Mr. Hilburn:

This refers to an audit of the Hilburn, et al, farming operations, performed by representatives of the Office of the Inspector General, United States Department of Agriculture, which has been in progress during the past several months.

On the basis of the audit findings, we have concluded that you and your brother, Bill R., farmed as a partnership in Luna County, New Mexico, during the 1966 program year. While farming in this capacity, the partnership drew in Bill R. Hilburn's name a total of $62,650.03 under the 1966 Feed Grain Program. It has been determined that during the same crop year the partnership had an interest in about 200 acres of excess feed grains which were planted on land owned by Mrs. Darlene P. Hooper (Desert Land Entry). Accordingly, under the offsetting compliance provisions of the regulations, you and your brother, Bill R., are liable for a refund of the total feed grain payments made to the partnership in 1966. Sec. 7 C. F. R. § 775.404(c)(2).

In addition, you as the farm operator participated in the 1967 Feed Grain Program and received $19,523.01

as having sole interest in the feed grains produced on the Luna County, New Mexico, farm B-205. During the process of audit, you indicated that you had shared the payments received with other persons who had an interest in the crop. However, you failed to disclose that a Mr. O. Lawrence Ruebush had an interest in some 240 acres of feed grains on the farm. Accordingly, you are liable for a refund of $3,434.10 which has been determined to have been Mr. Ruebush's proportionate share of the payment for the farm based upon the acreage he produced.

Our administrative appeal, regulations afford any producer an opportunity to seek reconsideration or appeal program determinations. If you are dissatisfied with the above determinations made with respect to your farming operations, you may obtain a reconsideration of such determinations in an informal hearing in connection therewith by filing a written request for reconsideration with this office within 15 days after the date of this letter.

If you wish, you may appear personally or have someone represent you. Such hearings are held in Washington, D. C., in accordance with the Appeal Regulations. Sec. 7 C. F. R. Part 780. The Department does not reimburse appellants for any costs in connection with appeals. If you wish reconsideration and a hearing is desired, please let us know and a time will be arranged. Should you have a preference as to the time and date you wish a hearing on these matters, you may give your preference. If possible, we will accommodate your request. If you wish reconsideration but do not

desire a hearing, any additional facts or other evidence you believe should be considered may be submitted.

The New Mexico State ASC Committee is being advised to withhold $34,759.11 from any payments otherwise payable to you and to release the remainder of your payments, provided the county and State committees are satisfied program provisions have been met and all interested producers (including Ruebush for 1968) have now been shown with their correct crop share percentages on the 1968 and 1969 Feed Grain and Cotton Program intention and payment forms. When this action has been taken, you may obtain a CCC loan on your share of any 1968 crop cotton or feed grains, if otherwise eligible.

Sincerely yours,

/s/ Chas. M. Cox

Chas. M. Cox
Acting Deputy Administrator,
State and County Operations

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-773

VERLON HILBURN, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a–11a) is not reported. The opinion of the court of appeals (Pet. App. 12a–17a) is reported at 463 F. 2d 1207.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on August 30, 1972 (Pet. App. 31a). The petition for a writ of certiorari was filed on November 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were denied due process by the Department of Agriculture's withholding of farm subsidy payments from them as a setoff against administratively determined overpayments in previous years.

STATEMENT

The Hilburns, who own farms and ranches in Texas, New Mexico, and Arizona (Pet. App. 1a), participated in several agricultural subsidy programs including the Feed Grain Program (7 U.S.C. 1441 note; 16 U.S.C. 590p(h) and (i)), the Agricultural Conservation Program (16 U.S.C. 590d *et seq.*), and the Cropland Adjustment Program (7 U.S.C. 1838) (App. 6a[1]). In April 1968 the Department of Agriculture commenced an extensive audit of the amounts paid to the Hilburns under these three programs during the years 1964 to 1968. The auditor interviewed the Hilburns and many of their business acquaintances during an investigation that covered four States. He also examined tax, real estate, and agricultural records pertaining to the Hilburns (App. 96a–99a, 214a–217a, 232a–233a).

Based upon this audit, the Department issued a stop-order on November 20, 1968, which halted all further payments to the Hilburns (App. 157a). Then, following meetings between the Hilburns, their attorney and Agriculture officials, the Deputy Administrator notified each of the Hilburns that he had determined on the basis of the audit that they had

[1] "App." refers to the appendix filed in the court of appeals.

received a total of $318,448.34 in improper payments and were liable for that amount plus interest (App. 26a–50a, Pet. App. 60a–62a).

With respect to the Feed Grain Program, the Deputy Administrator found numerous instances in which the various Hilburns had exceeded their feed grain base, that is, had planted more than the authorized maximum acreage for feed grains. He also found numerous instances in which the Hilburns had received payments under the Agricultural Conservation Program for expenses that they had not incurred but rather had been paid by other Hilburns. The Deputy Administrator concluded that these practices constituted attempts by the Hilburns to evade the maximum authorized payment to an individual under this program. The Deputy Administrator also found that one of the Hilburns had violated the Cropland Adjustment Program regulations by having exceeded the feed grain base on other farms in which he held an interest.

At the time the letters of notification were issued, the stop-orders with respect to two Hilburns were removed to permit the release of withheld payments in excess of the amounts determined to have been improperly paid (App. 158a). The notification letters also informed the Hilburns of their right to an administrative appeal, which would include an informal hearing. The Hilburns demanded a hearing under the Administrative Procedure Act, but the Department replied that that Act was inapplicable. In February 1970, Agriculture officials provided the Hilburns with the bulk of the audit report, including everything the

Deputy Administrator considered relevant to his decision (App. 91a, 92a).

The hearing, which was delayed until July 22, 1970, upon successive requests by the Hilburns' attorney (App. 159a), was attended by four of the Hilburns and their attorney. They were first given the pages of the audit report not previously furnished to them. Their attorney then protested that the designated hearing examiner had been personally involved in the investigation and previous determinations made in the case. The attorney also argued that due process required that the Hilburns be given the opportunity to confront and cross-examine witnesses against them, rather than have the Department base its case against them entirely on the audit report. When these protests were denied, the Hilburns refused to participate further in the hearing (App. 102a–131a).

In his October 20, 1970, appeal decision, the Deputy Administrator found that the Hilburns were liable for improper payments of $224,283.82 plus $24,050.66 interest, rather than $318,448.34 plus interest as initially determined (App. 213a, 231a–232a). The amount withheld by the stop-orders in excess of the liability established by the appeal decision was then released (App. 213a, 232a).

The Hilburns commenced this action on October 7, 1970, thirteen days prior to the Deputy Administrator's decision on appeal. They sought a writ of mandamus ordering the Secretary to pay all amounts withheld, an injunction preventing any future withholding, and a judgment declaring that the Agricul-

ture setoff procedures violated both the Administrative Procedure Act and the Due Process Clause (App. 25a). In its answer, the government asserted a counterclaim based upon the Deputy Administrator's final determination of the Hilburns' liability (App. 133a).

Upon the Hilburns' motion, their complaint was tried separately to the district court prior to the trial on the counterclaim. On June 22, 1971, the district court entered judgment in favor of the Hilburns of $272,851.96 (App. 244a–249a), holding that this amount had wrongfully been withheld by the Department because the Department's procedures had not been in accordance with its regulations and had violated due process. The court also held the APA applicable and ruled that the Agriculture regulations in issue failed to comply with the APA. On July 7, 1971, the court issued a writ of mandamus ordering the Secretary to pay the Hilburns $272,851.96 (App. 250a).

The court of appeals reversed (Pet. App. 12a), holding that "the Secretary had a right to withhold current funds in sums equal to the amounts administratively determined to have been overpaid in prior years, at least until such time as the issues relating to these overpayments have been judicially determined" (Pet. App. 13a). Distinguishing *Goldberg* v. *Kelly,* 397 U.S. 254, the court further held that a hearing prior to withholding was not constitutionally required.

On July 17, 1972, the court of appeals *sua sponte* directed the parties to file supplemental briefs discussing the applicability of *Fuentes* v. *Shevin,* 407

U.S. 67, which had been decided shortly after its decision (Pet. App. 29a–30a). Thereafter, on August 30, 1972, the court adhered to its original decision (Pet. 31a).

The district court tried the government's counterclaim on January 3 to 5, 1973. No decision has yet been announced.

ARGUMENT

1. Review of this case is not warranted, especially in light of the current posture of the proceedings. Petitioners have now had a trial in the district court on the merits of their claim. Thus the question of their entitlement to the funds at issue will shortly be decided after a trial fully comporting with due process. Therefore, the question whether the setoff here deprived petitioners of due process in view of the procedures of the Department of Agriculture is of no continuing vitality in this controversy.

2. In any event, the decision of the court of appeals is correct. It has long been settled that any creditor, including the government, has the right to withhold unilaterally sums payable to a debtor as a setoff against the indebtedness. *E.g., United States* v. *Munsey Trust Co.*, 332 U.S. 234; *Cherry Cotton Mills, Inc.* v. *United States*, 327 U.S. 536; *Gratiot* v. *United States*, 15 Pet. 336, 369. Cf. *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759. A creditor is justified in refusing "to pay what he owes until he is paid what is due him," *United States* v. *Munsey Trust Co., supra*, 332 U.S. at 240, in order to avoid the risk that a judgment against the debtor would prove uncollectable. The applicable Department of

Agriculture regulations expressly authorize withholding and setoff of payments under the three subsidy programs involved here. 7 C.F.R. 13.3, 13.4, 751.140, and 775.18 (1971); 7 C.F.R. 701.40 (1971). Since the Secretary found that the Hilburns were overpaid from 1964 to 1967, they are not entitled to a judgment for the amount withheld unless and until a court determines that they were not overpaid.

Relying on *Fuentes* v. *Shevin*, 407 U.S. 67, which dealt with State prejudgment replevin laws, petitioners claim, however, that a hearing must precede any setoff because of past overpayments. But *Fuentes* itself states that a hearing is not required before "summary seizure of property to collect the internal revenue of the United States," as this Court had held in *Phillips* v. *Commisioner*, 283 U.S. 589. Thus, even if the setoff here is characterized as a "seizure" of petitioners' property, the government's interest is equally strong in preventing depletion of the public treasury by making subsidy payments to which the recipient is not entitled because of prior overpayments.[2] And in

[2] *Goldberg* v. *Kelly*, 397 U.S. 254, 264, held that the interest in conserving fiscal resources did not render unnecessary a hearing before termination of welfare benefits because "the crucial factor * * * —a factor not present in the case of * * * virtually anyone else whose governmental entitlements are ended—is that termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." The position of petitioners in this case, of course, is in no way analogous to that of welfare beneficiaries who depend on continued receipt of governmental benefits. Thus, even if the setoff in this case is viewed as a partial and temporary termination of governmental benefits, petitioners' interest does

any event, unlike the situation in *Fuentes*, the government has not here seized property in petitioners' possession.

Moreover, the Hilburns were afforded an opportunity to be heard through the Department of Agriculture auditor's interviews prior to the setoff and through the proceedings before the Deputy Administrator after the audit and stop-orders had been issued. As *Fuentes* indicates, the form of the hearing required by due process depends on the importance of the payee's interest, 407 U.S. at 89, n. 20, and the auditor's pre-setoff interviews with the Hilburns are comparable to the interviews that preceded the termination of unemployment compensation in *Torres* v. *New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y.), vacated, 402 U.S. 968, adhered to, 333 F. Supp. 341, affirmed 405 U.S. 949, where the beneficiary had a much stronger interest in light of the need for unemployment compensation.[3]

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not outweigh the government's interest in protecting the public revenue, and a pretermination hearing is thus not required by the Due Process Clause.

[3] Moreover, in *Fuentes* the Court recognized that the right to predetermination proceedings can be waived. 407 U.S. at 94. Contractual provisions for the resolution of disputes have long been respected in government contracts. *E.g.*, *United States* v. *Wunderlich*, 342 U.S. 98, and an agency's regulations constitute part of the contracts it enters. *Paul* v. *United States*, 371 U.S. 245; *G. L. Christian and Associates* v. *United States*, 312 F. 2d 418 (Ct. Cl.), certiorari denied, 375 U.S. 954. Thus, the Agriculture regulations providing for withholding and setoff without extensive predetermination proceedings were part of the Hilburns' contract for subsidy payments. For purposes of the Due Process Clause, the Hilburns' had no vested "property" interest in continued subsidy payments that was not limited by Agriculture's power of withholding and setoff.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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